LIBRARY
SUPREME COURT, U.S.

Office Supreme Court, U. S.
FILED
OCT 27 1950
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1950

No. 338

JACK B. TENNEY, THE SENATE FACT-FINDING COMMITTEE ON UN-AMERICAN ACTIVITIES (a California Legislative Committee), HUGH M. BURNS, NELSON S. DILWORTH, FRED H. KRAFT, LOUIS G. SUTTON and CLYDE A. WATSON,

Petitioners,

vs.

WILLIAM PATRICK BRANDHOVE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

GEORGE OLSHAUSEN,
1182 Vallejo Street, San Francisco 9, California,
MARTIN J. JARVIS,
ELMER P. DELANY,
400 Grant Building, San Francisco 3, California,
RICHARD O. GRAW,
200 Bush Street, San Francisco 3, California,
Attorneys for Respondent.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	4
Argument	9
A.	
State law cannot vest any person with immunity to violate the federal rights of another	9
B.	
The utterance of a political opinion by circulating a petition among state legislators is protected by the First Amendment to the United States Constitution as read into the Fourteenth Amendment	14
C.	
Under the Civil Rights Statutes, the federal courts are empowered to determine whether a state legislative committee or its members have violated the federal rights of another by intentional abuse of state power	15
D.	
In addition to the abridgement of respondent's rights of free speech and petition, respondent was deprived of due process of law, the equal protection of the laws and equal privileges and immunities under the Constitution of the United States at the legislative committee hearing in question	19
(1) Violation of due process of law	19
(2) Denial of equal protection of the laws	20
(3) Abridgement of the privileges and immunities of respondent as a citizen of the United States	20
E.	
The resolution of the California State Senate creating the committee in question known as the Senate Fact-Finding Committee on Un-American activities is unconstitutional	21
Conclusion	22

Table of Authorities Cited

Cases	Pages
Barsky v. United States, 167 F. (2d) 241	12, 13
Brinkerhoff-Faris Trust and Sav. Co. v. Hill, 281 U.S. 673	18
Connally v. General Construction Co., 269 U.S. 385	21
Cook v. Marshall County, 196 U.S. 261	18
Dennis v. United States, 171 F. (2d) 986	13
Eisler v. United States, 170 F. (2d) 273	13
Ex parte Virginia, 100 U.S. 339	10
Hague v. C.I.O., 307 U.S. 496	21
In re Di Torio, 8 F. (2d) 279	21
Jones v. Security Exchange Commission, 298 U.S. 1	14
McGrain v. Daugherty, 273 U.S. 135	13
Oyama v. California, 332 U.S. 633	17
Patton v. Mississippi, 332 U.S. 463	17
Perez v. Sharp, 30 Cal. (2d) 711, 198 Pac. (2d) 17	21
Picking v. Pennsylvania Ry. Co., 151 F. (2d) 240	11
Rescue Army v. Municipal Court, 331 U.S. 549	22
Screws v. United States, 325 U.S. 91	10, 11
Shelley v. Kramer, 334 U.S. 1	17, 18
Small Co. v. American Sugar Refining Co., 267 U.S. 233	21
United States v. C.I.O., 335 U.S. 106	22
United States v. Classic, 313 U.S. 299	10
Western Union Telegraph Co. v. Foster, 247 U.S. 105	16
West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624	14, 15

Statutes

	Pages
Civil Rights Act, page 251	3, 11
Pennsylvania Statutes, sections 192, 292	11
8 U.S.C., sections 43, 47(3)	2, 9
8 U.S.C., section 43	11
8 U.S.C., section 47	11

Texts

Black's Law Dictionary, 3rd Ed., page 1209	16

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1950

No.

JACK B. TENNEY, THE SENATE FACT-FINDING COMMITTEE ON UN-AMERICAN ACTIVITIES (a California Legislative Committee), HUGH M. BURNS, NELSON S. DILWORTH, FRED H. KRAFT, LOUIS G. SUTTON and CLYDE A. WATSON,

Petitioners,

vs.

WILLIAM PATRICK BRANDHOVE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The memorandum opinion of the District Court (R. 124-125) is unreported. The opinion of the Court of Appeals (R. 137) is reported in 183 F. (2d) 121.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED.

The sole question presented is whether Respondent's complaint states a claim for relief under the Civil Rights Statutes (8 U.S.C., sections 43, 47(3)).

In the light of Petitioners' contentions, the following subordinate questions will be discussed:

(a) Are members of State Legislative Committee and the Committee subject to liability under the Civil Rights Statutes or are they immune from such liability?

(b) Is a citizen of the United States, in circulating a petition among the legislators of his own State, protected by the First Amendment to the Federal Constitution as read into the Fourteenth Amendment or is such a citizen left without protection under the United States Constitution?

(c) Are the Federal Courts powerless to determine whether members of a State Legislative

Committee and such Committee itself have abused their State powers with the intent and object of silencing a political opponent and intimidating and deterring him in proposing discontinuance of appropriation of funds for such Committee?

In addition, the following subordinate questions are raised by Respondent:

(1) Can a State Legislative Committee and its members escape the scrutiny of the Federal Courts where due process of law, equal protection under the laws and the guarantee of equal privileges and immunities of a citizen have been violated by them against a political opponent in an attempt under color of State law to silence such opposition?

(2) Is the California Senate Resolution (R. 12) creating the Senate Fact-Finding Committee on Un-American Activities unconstitutional for lack of definiteness and certainty as applied to the facts pleaded in Respondent's complaint?

STATUTES INVOLVED.

The pertinent provisions of the Civil Rights Statutes involved are set forth in the Petition at pp. 10-11.

STATEMENT.

On January 28, 1949, respondent, William Patrick Brandhove circulated a petition entitled: "A Protest Against a Renewed Appropriation for the California Senate Committee on Un-American Activities (The Tenney Committee)" among the members of the California Legislature at the State Capitol in Sacramento. (R. 4, 18-22.) The subject matter of said petition was stated therein as follows:

> "I, William Patrick Brandhove, charge that the California Senate Committee on Un-American Activities (The Tenney Committee) used me as an instrument to smear Congressman Franck R. Havenner as a 'Red' when he was a candidate for Mayor of San Francisco in 1947, and that the Republican machine in San Francisco and the campaign management of Elmer E. Robinson, Franck Havenner's opponent, conspired with The Tenney Committee to this end" (R. 4-5, 18-22).

In support of this statement said petition referred to a number of incidents to substantiate this charge (R. 19-20), and the stated purpose of said petition was to persuade the California Legislature to discontinue further appropriations of funds for The Tenney Committee (R. 5, 18-22).

While respondent was engaged in circulating said petition, as aforesaid, a subpoena was served upon him ordering him to appear as a witness at a hearing to be held before The Tenney Committee on the following day, to wit: January 29, 1949. (R. 5, 22-23.) No reference was made in said subpoena to

the purpose or object of said hearing, or of the testimony required thereat. (R. 5, 22-23.) Before the service of said subpoena on respondent, but after the content of said circulated petition had become known to petitioner, Jack B. Tenney, said petitioner, the chairman of the criticized committee, discussed with defendant Elmer E. Robinson the best ways and means of defeating the effect and purpose of said petition and they then and there agreed that the aforementioned hearing should be held, and that defendant, Elmer E. Robinson should appear at said hearing as a voluntary witness to deny the truth of the contents of respondent's petition. (R. 5-6, 45-47.)

On the same day, to wit, January 28, 1949, and in order to silence respondent and defeat the effect of his said petition, petitioners Jack B. Tenney and Hugh M. Burns, chairman and vice-chairman respectively of The Tenney Committee, with regard to respondent's circulated petition, sent State telegrams to two District Attorneys of the State of California, demanding on behalf of said Committee that respondent be prosecuted for perjury. (R. 6, 23-25.)

A hearing was held by The Tenney Committee on the next day, to wit, January 29, 1949, at which all petitioners were sitting as members of said Committee, and at which defendant, Elmer E. Robinson, as agreed with the chairman of said Committee, appeared as a voluntary witness. (R. 6, 27-28, 47.) At said hearing defendant Elmer E. Robinson was permitted to make a lengthy unsworn statement first (R. 7, 45-48) and after having been sworn as a volun-

tary witness was given unbridled discretion in conducting a self justification of the charges contained in respondent's said petition. (R. 7, 50-67.) Pursuant to the subpoena served upon him, respondent appeared at said hearing and after answering questions as to his identity (R. 28) objected to the committee's further questions on the ground that the Committee was not acting for a legislative purpose at that hearing but was attempting to acquit itself of the charges made in respondent's petition to the California Legislature and was therefore then acting as judge and accused in the same case thereby exceeding its power and jurisdiction. (R. 8, 28-32, 35-38.) These objections were overruled by The Tenney Committee (R. 32) and respondent was then asked a great number of questions with regard to his personal affairs and acquaintances to which said Committee had previously obtained sworn answers from him. (R. 7, 38-41, 42-43.) At said hearing petitioner Jack B. Tenney, as chairman of said Committee, read into the record of the hearing a false alleged criminal record of respondent and a newspaper article wherein an affidavit of respondent was called a "tissue of lies!" and an alleged telephonic statement by the Chief Counsel of The Tenney Committee to petitioner Jack B. Tenney "that Mr. Brandhove (respondent) was a liar. (R. 7, 43-45, 74.) Furthermore, at said hearing respondent's counsel, although he was not summoned, was called as a witness by said Committee and interrogated at length about his private affairs, and when he referred to decisions of the United States

Supreme Court supporting the objections raised by respondent against said hearing and supporting respondent's refusal to answer questions thereat, said counsel was threatened with expulsion from the hearing room. (R. 7-8, 48-50, 34-35.) At said hearing The Tenney Committee, by unanimous vote of its members, resolved that a criminal complaint be filed in the proper Court at Sacramento, California, because of respondent's refusal to answer questions thereat. (R. 8, 42.) Such complaint charging respondent with the misdemeanor of violating section 9412 of the Government Code of the State of California, signed and sworn to by petitioner, Jack B. Tenney, was filed on January 31, 1949, in the Municipal Court of the City of Sacramento. (R. 8, 74.) Upon said complaint, respondent was arrested and imprisoned from the 1st day of February to the 15th day of February, 1949. (R. 8.) Respondent was tried with jury on said complaint on February 28, 1949, up to and including March 5, 1949, on which latter date the jury announced that the jurors could not agree on a verdict, the count being eleven (11) for acquittal and one (1) for conviction. (R. 9.) Said cause was continued to March 9, 1949, on which date on motion of the prosecuting attorney the charge was dismissed and the respondent discharged. Respondent committed no public offense at said hearing since the hearing was not held for a legislative purpose and was not a fair and impartial hearing as required under the 14th Amendment to the United States Constitution and under the resolution creating The Tenney Committee (R. 12)

and that the questions asked of respondent were not material or proper as required by section 9412 of the California Government Code. (R. 8-9.) After respondent's discharge from custody, he brought this action for damages under the Civil Rights Statutes alleging that the acts of the petitioners and defendant Robinson above set forth were done or participated in with malice and intent to intimidate and silence respondent and to deter and prevent him from effectively exercising his constitutional rights of free speech and to petition the legislature for redress of grievances; that he was deprived of the equal protection of the laws, due process of law and of the enjoyment of equal privileges and immunities as a citizen of the United States under the law (R. 10); that the acts of all petitioners were done under color of State authority; that all petitioners, together with defendant Robinson, conspired for the aforesaid purposes and acted as above set forth in furtherance of such conspiracy. (R. 10.)

Upon petitioners and defendant Robinson's motions to dismiss complaint (R. 76-85, 89-97) the District Court made its order granting said motions (R. 124-125) and entered judgment dismissing respondent's action on the merits. (R. 125-126.)

On appeal from the judgment of the District Court (R. 126) the Court of Appeals for the Ninth Circuit reversed the judgment with remand as to petitioners and affirmed the judgment with regard to defendant Robinson. (R. 137, 183 F. (2d) 121.)

Petitioners seek review of the action of the Court of Appeals adverse to them on certiorari in the premises; respondent seeks review of that portion of the judgment of the Court of Appeals favorable to defendant Robinson on cross-petition for certiorari to be filed in this honorable Court.

ARGUMENT.

A.

STATE LAW CANNOT VEST ANY PERSON WITH IMMUNITY TO VIOLATE THE FEDERAL RIGHTS OF ANOTHER.

It is axiomatic under our constitutional system that State power, by whomsoever exercised, is subject to the United States Constitution and the Statutes of Congress enacted thereunder.

If a State could clothe its Legislative Committees or the members thereof with power to violate fundamental federal rights in disregard of the Civil Rights Statutes (8, U.S.C., §§ 43, 47(3)), then the Federal Constitution and the Civil Rights Statutes protecting the rights of citizens thereunder would be a the mercy of such Committee and their members—a patent absurdity.

It is the essence of the provisions of the Civil Rights Statutes to protect all individuals within the jurisdiction of the United States from any exercise of State authority in violation of the federal rights of that individual.

It is immaterial whether the person who violates the federal rights of another by exercise of State authority acts in conformity with State law.

United States v. Classic, supra, 313 U.S. 299, 326:

"Misuse of power, possessed by virtue of State law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."

Ex parte Virginia, 100 U.S. 339, 346, 347:

"* * * A State acts by its legislative, its executive or its judicial authority. It can act in no other way. The constitutional provision therefore must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with State's power, his act is that of the State. This must be so or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or evade it."

Screws v. United States, 325 U.S. 91, 114 and 133.

"Violation of state law there may be. But from this no immunity to federal authority can arise where any part of the Constitution has made it

supreme. To the Constitution state officials and the states themselves owe first obligation. The federal power lacks no strength to reach their malfeasance in office when it infringes constitutional rights. If that is a great power, it is one generated by the Constitution and the Amendments to which the states have assented and their officials owe prime allegiance.

The right not to be deprived of life or liberty by a state officer who takes it by abuse of his office and its power is such a right. To secure these rights is not beyond federal power. This, sections 19 and 20 have done in a manner history has long since validated." (Rutledge, J., concurring in result, *Screws v. United States*, p. 133.)

In *Picking v. Pennsylvania Ry. Co.*, 151 F. (2d) 240, it was held:

Congress by enacting section 43 Title 8 U.S.C. intended to abrogate absolute privilege conferred by common law upon state judicial officers in performance of their duties to the extent indicated by said section (p. 250), and further: where a cause of action against the Governor of Pennsylvania based on his acting upon a warrant for extradition of Plaintiffs to New York arose under section 47 Title 8 U.S.C., Pennsylvania statutes sections 192, 292 relieving the Governor of liability if he based his action upon advice of the Department of Justice could not relieve him from his responsibility under the Civil Rights Act. (p. 251.)

Whether the federal law, as distinguished from State law, can vest such immunity in anyone exercising federal governmental power is not in issue in this case, and therefore authorities cited by petitioners with respect to Congress or congressional committees cannot support their contention that they are immune from the sanctions of the Civil Rights Statutes.

There is a fundamental difference between the rights conferred upon a person by the Civil Rights Statutes against the abuse of State power and his remedies against abuse of Federal power by Congressional Committees or public officers of the Federal government. While the Civil Rights Statutes give a cause of action for damages against anyone acting under color of State law who has violated Federal rights of the complaining party, a rule of immunity has been applied to Congressional Committees and Federal officers, which has been stated in *Barsky v. United States*, 167 F. (2d) 241, 250, as follows:

> "The remedy for unseemly conduct, if any, by Committees of Congress is for Congress, or for the people; it is political and not judicial. The courts have no authority to speak or act upon the conduct by the legislative branch of its own business, so long as the bounds of power and pertinency are not exceeded, and the mere possibility that the power of inquiry may be abused, 'affords no ground for denying the power.' The question presented by these contentions must be view in the light of the established rule of absolute immunity of governmental officials, Congressional and Administrative, from

liability for damage done by their acts or speech, even though knowingly false or wrong. The basis of so drastic and rigid a rule is the overbalancing of the individual hurt by the public necessity for untrammeled freedom of legislative and administrative activity within the respective power of the legislative and the executive."

Since the Civil Rights Statutes and the decisions of the United States Supreme Court and other Federal Courts constr uing them make it clear that the Federal rights of citizens protected thereunder shall not give way to any power or immunity which State law may attempt to confer upon any State body or State official, it would therefore confuse the legal issues of the present case to discuss cases concerning Congressional Committees such as *Barsky v. United States,* 167 F. (2d) 241; *Dennis v. United States,* 171 F. (2d) 986 and *Eisler v. United States,* 170 F. (2d) 273. It may be said in passing, however, that even as to the power of Congresssional Committees it was stated in *McGrain v. Daugherty,* 273 U.S. 135, 175-176:

"We must assume, for present purposes, that neither house will be disposed to exert the power beyond its proper bounds, or without due regard to the rights of witnesses. But if, contrary to this assumption, controlling limitations or restrictions are disregarded, the decisions in *Kilbourn v. Thompson*[1] and *Marshall v. Gordon*[2] point to admissible measures of relief. And it is a necessary deduction from the decisions in *Kilbourn v.*

[1] 103 U.S. 168.
[2] 243 U.S. 521.

Thompson and *Re Chapman*[3] that a witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry."

See also: *Jones v. Security Exchange Commission*, 298 U.S. 1, 26, holding that a citizen, when interrogated about his private affairs, has the right before answering, to know why the inquiry is made; and if the purpose disclosed is not a legitimate one, may not be compelled to answer.

B.

THE UTTERANCE OF A POLITICAL OPINION BY CIRCULATING A PETITION AMONG STATE LEGISLATORS IS PROTECTED BY THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION AS READ INTO THE FOURTEENTH AMENDMENT.

No prolonged argument seems necessary to meet petitioner's contention that the right to petition the legislature of a State is not protected by the federal constitution for their reason given that the First Amendment protects the right to petition only the Federal government for redress of grievances.

The First Amendment, as such, is not a limitation on State power; it limits State power, however, by being read into the Fourteenth Amendment.

West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624, 639.

---

[3]166 U.S. 661.

Since the Fourteenth Amendment is "an instrument for transmitting the principles of the First Amendment," it is clear that on such transmittal, the principles of the First Amendment necessarily become qualified to make them effective against State power rather than federal power.

West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624, 639.

Obviously the right to petition the "government" becomes the right to petition the State government rather than the Federal government when the First Amendment is transmitted into the Fourteenth.

Furthermore, no citation of authorities seems necessary to point out that the right to petition the government for redress of grievances is included in the right of free speech and, as such, is protected as free speech wherever that right is recognized.

C.

UNDER THE CIVIL RIGHTS STATUTES, THE FEDERAL COURTS ARE EMPOWERED TO DETERMINE WHETHER A STATE LEGISLATIVE COMMITTEE OR ITS MEMBERS HAVE VIOLATED THE FEDERAL RIGHTS OF ANOTHER BY INTENTIONAL ABUSE OF STATE POWER.

(1) The power of the Federal Courts to protect Federal rights under the Civil Rights Statutes extends to anyone clothed with State power who intentionally deprives a citizen of his Federal rights.

Where State power is used for such an end, the abuse cannot be excused by the fact that the same power could have been used for a proper end. As stated by Mr. Justice Holmes speaking for this Court in *Western Union Telegraph Co. v. Foster*, 247 U.S. 105, 114:

> "Acts generally lawful may become unlawful when done to accomplish an unlawful end, U. S. v. Reading Co., 226 U.S. 324, 357, and a constitutional power cannot be used by way of condition to attain an unconstitutional result."

It is axiomatic that the same power which may be constitutionally exercised under one set of facts, becomes unconstitutional and unlawful if exercised under different circumstances.

In the instant case we are not concerned with the investigatory and inquisitorial power of State Legislative Committees for an end that is lawful under the Federal law. We are here concerned with an exercise of such State power for an unlawful end, namely, to deprive a citizen of fundamental Federal rights. The question here involved is not the motive[4] of the Committee and its members, but is whether or not they acted with the intent and for the purpose of silencing a political opponent by abuse of State power.

---

[4] "'Motive' and 'intent' are not identical, and an intent may exist where a motive is wanting. Motive is the moving power which impels to action for a definite result. Intent is the purpose to use a particular means to effect such result. In the popular mind, intent and motive are often regarded as the same thing; but in law there is a clear distinction between them. * * *" Black's Law Dictionary, 3rd Ed., p. 1209, and cases there cited.

Where the invasion of Federal constitutional rights is at issue, the scrutiny of the Federal Courts extends of necessity to factual questions, such as intent, deliberate planning and malice. As stated in *Oyama v. California*, 332 U.S. 633, 636:

> "In approaching cases such as this one, in which federal constitutional rights are asserted, it is incumbent on us *to inquire not merely whether those rights have been denied in express terms, but also whether they have been denied in substance and effect. We must review independently both the legal issues and those factual matters with which they are commingled.*" (Emphasis added.)

In the *Oyama* case this Court referred to *Patton v. Mississippi*, 332 U.S. 463, 465, where the impact of the principle against deliberate exclusion of Negroes from a jury was stated as follows:

> "A long and unbroken line of our decisions * * * has reiterated that principle, regardless of whether the discrimination was embodied in statute or was apparent from the administrative practices of state jury selection officials, and regardless of whether the system for depriving defendants of their rights was 'ingenious or ingenuous.' *Whether there has been systematic racial discrimination by administrative officials in the selection of jurors is a question to be determined from the facts in each particular case.*" (Emphasis added.)

See also, *Shelley v. Kramer*, 334 U.S. 1.

If, as alleged by respondent, the Committee in question and its members acted with such intent and

for such unlawful end, they cannot escape the sanctions of the Civil Rights Statutes and the word "motive" cannot be used as a magic wand to obliterate the manifest purpose of the Federal Constitution and those Federal statutes enacted to protect civil rights.

See: *Cook v. Marshall County*, 196 U.S. 261, 271 infra.

(2) The doctrine of separation of powers, important as it is in determining judicial review of acts of Congressional committees by Federal Courts has no application where the issue is abuse of State power in collision with Federal rights.

In the instant case we are not concerned with the question whether Federal Courts can check the abuse of the powers of Congress and Congressional Committees, or whether the principle of separation of powers bars the Federal Courts either absolutely or to some extent from such review. If *State action*, as distinguished from Federal governmental action, is involved, the Federal Courts are not barred from exercising their power to protect the Federal rights of citizens, regardless of whether the asserted violation of such rights emanates from the legislative branch or any other branch of the State government. "The Federal guaranty of due process extends to State action through its judicial as well as through its legislative, executive or administrative branch of government." *Brinkerhoff-Faris Trust and Sav. Co. v. Hill*, 281 U.S. 673, 680; *Shelley v. Kramer*, 334 U.S. 1, 15.

D.

IN ADDITION TO THE ABRIDGEMENT OF RESPONDENT'S RIGHTS OF FREE SPEECH AND PETITION, RESPONDENT WAS DEPRIVED OF DUE PROCESS OF LAW, THE EQUAL PROTECTION OF THE LAWS AND EQUAL PRIVILEGES AND IMMUNITIES UNDER THE CONSTITUTION OF THE UNITED STATES AT THE LEGISLATIVE COMMITTEE HEARING IN QUESTION.

(1) Violation of due process of law.

It cannot be seriously questioned that the issue of violation of due process of law has been properly raised by respondent's complaint. In this regard it must be noted that the record of the hearing in question together with the events preceding it are pleaded verbatim and made a part of Respondent's complaint. (Complaint paragrs. 8, 3; R. 4-5, 7-8, 22-23, 26-75.)

To conclude that Respondent was not deprived of both procedural and substantive due process under the Fourteenth Amendment of the United States Constitution by State authority at the Committee hearing in question would mean to say that a State legislative committee, becoming aware of a citizen's criticism and protest against a further appropriation of funds for that committee, for the purpose of suppressing that criticism, can act as judge and *accused* in the same cause; that such a committee can lawfully and while the citizen is actually engaged in such criticism, subpoena him to appear at a hearing without disclosing in such subpoena the purpose thereof, and at such hearing, in addition to interrogating the citizen with questions, sworn answers to which that committee had previously obtained from that citizen,

can vilify and discredit that citizen by reading into the record of such hearing a false alleged criminal record of that citizen; a newspaper article wherein an affidavit of that citizen was called a "tissue of lies"; and an alleged telephonic statement that that citizen "was a liar"; and further at such hearing can deter and intimidate that citizen by interrogating his counsel, present thereat with permission of such committee, and without justification or excuse, threaten expulsion of such counsel from the hearing room.

If such is a fair and impartial hearing as contemplated under the Fourteenth Amendment of the Constitution of the United States, then Respondent admits that he has failed to state a claim for relief on such ground.

(2) Denial of equal protection of the laws.

This Court will observe from the facts pleaded (Complaint paragrs. 7, 8, and 11; R. 6-9, 26-75) that respondent and his counsel, in contradistinction to the defendant Robinson, were singled out for obvious unfair treatment as witnesses at the Committee hearing in question which warrants respondent's contention that the Equal Protection Clause of the Federal Constitution was violated by abuse of State authority as to him.

(3) Abridgement of the privileges and immunities of respondent as a citizen of the United States.

The Federal rights of respondent to freedom of speech, to petition the government for redress of

grievances, to procedural and substantive due process of law and to equal protection of the laws are included under the privileges and immunities clause of the Federal Constitution, Amendment Fourteen.

It is apparent from the Committee hearing in question, without reiteration of the particulars hereinabove set forth, that respondent, as a citizen of the United States, was denied these privileges and immunities by abuse of State power.

See: *Hague v. C. I. O.*, 307 U.S. 496.

E.

THE RESOLUTION OF THE CALIFORNIA STATE SENATE CREATING THE COMMITTEE IN QUESTION KNOWN AS THE SENATE FACT-FINDING COMMITTEE ON UN-AMERICAN ACTIVITIES IS UNCONSTITUTIONAL

The California Senate resolution creating The Tenney Committee (R. 12-18) violates the due process clause of the Federal Constitution in that it lacks the degree of certainty which is required in a statute or other rule of state law, affecting fundamental rights, as applied to respondent.

Connally v. General Construction Co., 269 U.S. 385, 391;

Small Co. v. American Sugar Refining Co., 267 U.S. 233, 239;

In re Di Torio, 8 F. (2d) 279, 281;

Perez v. Sharp, 30 Cal. (2d) 711, 728, 198 Pac. (2d) 17.

The issue of the constitutionality of said resolution is raised however only in the alternative; it need not be gone into before the other issues are determined, since it is clear that said Committee acting under said resolution acts under color of state law regardless of the constitutionality of the resolution.

See:

United States v. C.I.O., 335 U.S. 106, 110, 124, 125;

Rescue Army v. Municipal Court, 331 U.S. 549, 568, 569.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Dated, San Francisco, California,
October 23, 1950.

Respectfully submitted,
GEORGE OLSHAUSEN,
MARTIN J. JARVIS,
ELMER P. DELANY,
RICHARD O. GRAW,
Attorneys for Respondent.